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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	**CC Docket No. 97-90**
	)	**CCB/CPD 97-12**
Requests of U S WEST Communications, Inc. for Interconnection Cost Adjustment Mechanisms	)	

REPLY COMMENTS OF AT&T CORP.

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April 28, 1997

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The opening comments in this proceeding demonstrate that the Commission should act now -- either in this proceeding or on AT&T's Petition for Reconsideration in CC Docket No. 96-98[1] -- to confirm that the settled economic principles applied to recurring charges in the Local Competition Order[2] also constrain non-recurring charges. Otherwise, incumbents can and will use excessive and discriminatory non-recurring charges to impede entry and deny consumers the benefits of local competition. See, e.g., GST Telecom p. 4 ("Under U S WEST's ICAM, competitors that buy unbundled loops would pay the standard recurring and non-recurring interconnection and unbundled loop charges approved by the Washington Commission, plus $144,000 a month for the interconnection

[1] See Petition of AT&T Corp. for Reconsideration and/or Clarification, pp. 6-20, CC Docket 96-98 (Sept. 30, 1996) ("AT&T 96-98 Clarif. Pet."); AT&T's Reply to Oppositions and Comments to Petitions for Reconsideration and Clarification of First Report and Order, pp. 1-14, CC Docket 96-98 (Nov. 14, 1996) ("AT&T 96-98 Clarif. Reply").

[2] First Report & Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996) ("Local Competition Order").

ICAM, plus $35,000 per month for the unbundled element ICAM") (emphasis in original); ACSI p. 7 (if potential competitors are saddled with all competition onset costs, "not only would competitors' ability to compete on price be undermined severely, but the surcharges collected could be used by [incumbents] to subsidize artificially low rates designed to kill-off existing competitors and forestall new entry altogether"); Letter of Edward D. Young, III, Bell Atlantic, to Patrick DeGraba, Federal Communications Commission, p. 1 (Feb. 10, 1997) ("the current start-up cost estimate for OSS . . . exceeds $20 million").[3]

AT&T has derived from the rules and principles adopted in the Local Competition Order five "one-time" cost guidelines designed to limit the ability of incumbents to act on their anticompetitive incentives, but not the ability of states to tailor nondiscriminatory recovery mechanisms based on "a thorough analysis of the ILEC filings by state staff and competitors." California Public Utilities Commission ("CPUC") p. 7. See AT&T 96-98 Clarif. Pet. pp. 6-8, 10. Specifically, the Commission should clarify that: (1) an incumbent's one-time cost charges may never exceed amounts determined by spreading those costs across all carriers, including the incumbent, on a proportionate basis, and may be further limited as necessary by the states to maintain competitive neutrality; (2) any of an incumbent's one-time costs eligible for recovery from entrants must be recovered from all entrants, regardless of entry strategy, in proportion to the number of retail customers they serve in the relevant period; (3) one-time costs must be amortized over the economic lives of the facilities and systems deployed or modified pursuant to the same depreciation principles that apply to an incumbent's other capital investments; (4) only activities that the owner of an efficient single carrier network would undertake to make that network

[3] Comments of the parties in this proceeding are cited here by party and page number.

multiple-carrier capable may be considered for inclusion in non-recurring cost charges; and (5) one-time cost charges must reflect only efficient, forward-looking costs. See AT&T pp. 6-17. AT&T also supports the related proposal of ACSI (pp. 3-4) and GST Telecom (pp. 7-9) that the Commission clarify that there can be no additional charges for one-time costs that are already reflected in recurring charges -- as they often may be, for example, as a result of the forward-looking nature of TELRIC cost models that assume efficient facilities with multiple carrier capabilities not present in an incumbent's existing network. See Local Competition Order ¶ 686 (TELRIC reflects "[o]ne-time costs associated with the acquisition of capital goods . . . amortized over the economic life of the assets").

Each of these rules follows logically and directly from the Commission's unassailable conclusion in the Local Competition Order that efficient competition can exist only if incumbents' charges for inputs sold to competitors are nondiscriminatory and based on forward-looking costs. That is why parties opposed to non-recurring charge standards – principally GTE and the Bell Operating Companies – have little to say about the merits of their anticompetitive non-recurring charge schemes or the proposals to limit those charges. Instead, they quickly retreat to the now familiar two-part refrain that: (1) incumbents have "entitle[ments] to recover all costs incurred" from their competitors,[4] and (2) the Commission is, in all events, powerless to do anything about discriminatory and anticompetitive charges.

The Commission has already soundly rejected the view that the Act guarantees that incumbents will receive from their competitors full recovery of "actual" expenditures.

[4] SBC/Pacific p. 4 (emphasis in original); see also GTE p. 3 ("the Act clearly states that a CLEC will pay all of the ILEC's costs").

See, e.g., Local Competition Order ¶ 706 ("regulation does not and should not guarantee full recovery of [LECs] embedded costs"). As demonstrated below, the incumbents' alternative arguments that jurisdiction,[5] "judgment," (GTE p. 10), Commission policy or constitutional principles of "forced servitude," (U S WEST p. 8) require the Commission to turn a blind eye to non-recurring charge abuses are equally meritless. The Commission can and should act now to clarify its rules and discourage incumbents from using one-time costs to forestall local competition.

Jurisdiction. As AT&T and others have repeatedly demonstrated, the Commission has clear authority under the Act to establish boundaries within which the states will act to assure that one-time and other non-recurring charges are just, reasonable and nondiscriminatory and do not have the effect of prohibiting competition. See, e.g., AT&T 96-98 Clarif. Reply pp. 3-7. First, Section 251(d)(1) requires the Commission to establish regulations to implement all of the requirements of § 251, including the obligation of incumbents to charge "just, reasonable, and nondiscriminatory" rates.[6] Second, the facilities at issue here inseverably are used to provide both intrastate and interstate services,[7] and Section 2(a) of the Communications Act therefore independently

[5] E.g., BA/NYNEX p. 1 ("the Act deprives the Commission of authority to regulate the pricing of interconnection, resale, and unbundled network elements"); SBC p. 3 (Eighth Circuit stay "legally estopp[s]" the Commission from acting here").

[6] 47 U.S.C. § 251(c)(2)(D). See also 47 U.S.C. §§ 154(i), 303(r).

[7] U S WEST concedes, for example, that it seeks recovery for "additional interoffice transport facilities and . . . capacity at the tandem," Utah ICAM Pet. p. 3 & n.1, and, as Comptel notes, "those interoffice transport and tandem facilities will be used not only to route local traffic from interconnecting local carriers, but to route interstate access traffic for long distance carriers pursuant to Part 69 of the Commission's rules." Comptel p. 11.

gives the Commission jurisdiction over charges associated with those facilities. See, e.g., AT&T Clarif. Reply pp. 5-6 & n.4 (citing cases).

Further, § 253 of the Act, entitled "Removal of Barriers to Entry," authorizes the Commission to pre-empt any state requirement that prohibits "any entity" from offering "any interstate or intrastate telecommunications service." As AT&T explained in its initial comments in this proceeding (p. 6), one-time competition onset costs imposed only on entrants are classic entry barriers.[8] The devastating impact that discriminatory and unchecked non-recurring charges would have on nascent competition is well documented in both the record on reconsideration in Docket No. 96-98 and the comments in this proceeding. See AT&T 96-98 Clarif. Pet. pp. 8-10; AT&T 96-98 Clarif. Reply pp. 6-8 & n.8; ACSI p.6 ("Since U S West itself would not be subject to the ICAM surcharges, they amount to nothing more than an entry fee for entities seeking to infringe upon U S WEST's local services monopoly"); GST Telecom pp. 3-4, 8-9 (cataloguing non-recurring charge proposals).[9] In short, the Commission has ample authority to adopt the rules proposed by AT&T and others for the recovery of non-recurring costs.[10]

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[8] See Rebuttal Testimony of Janusz A. Ordover, State of New York Public Service Commission (March 19, 1996) (attached to Letter of Bruce K. Cox, AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission (Apr. 2, 1997)).

[9] Incumbent claims that the Commission must watch helplessly as their anticompetitive schemes are implemented and, indeed, cannot act under § 253 until an incumbent "has actually prohibited" competition, BA/NYNEX pp. 2-3, are sophistry, and ignore well-settled principles of administrative law. The pending threats of incumbent LECs to impose excessive and discriminatory non-recurring charges through ICAM and similar schemes themselves can deter entry, as the comments demonstrate. And nothing in § 253 alters the longstanding authority of agencies to "issue a declaratory order to terminate a controversy or remove uncertainty," 5 U.S.C. § 554(e), which is precisely what the Commission would accomplish by acting now to forbid discriminatory non-recurring charge schemes. To the contrary, § 253 explicitly authorizes the Commission to eliminate the threat to competition presented by such schemes. In any event, §§ 4(i), 201(b), and 303(r) independently provide the Commission with authority to issue regulations in advance that prospectively

"Judgment". GTE and others also contend that "[d]eferral to the states is warranted as a matter of judgment" because "[e]ach ILEC has a different network and systems," "each requires different changes and new systems" and "[s]tate commissions are familiar with the unique circumstances of the local networks in their jurisdictions." GTE pp. 10-11. To the extent GTE is suggesting that one-time cost charges should reflect an incumbent's actual expenditures to upgrade its embedded network (as opposed to the forward-looking costs that would be incurred by an efficient monopolist to provide multiple carrier capabilities), GTE again betrays its single-minded obsession with the embedded cost approaches rejected by the Commission (and state commissions). To the extent GTE merely suggests that relevant local differences may exist and that state commission knowledge and expertise will play an important role in assuring that non-recurring charges are just, reasonable and nondiscriminatory, however, AT&T fully agrees. But that premise in no way supports GTE's conclusion that the Commission should do nothing to address the non-recurring cost problem.

If local variations, such as entrants' relative competition onset costs, have some legitimate impact on appropriate recovery levels or mechanisms, the Commission's Rules

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define the principles to be applied in future proceedings. See, e.g., AT&T 96-98 Clarif. Reply p. 7 (citing FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940)).

[10] The Eighth Circuit's temporary partial stay in no way disables the Commission from acting now on the issues raised in this petition or, more broadly, in the Docket No. 96-98 reconsideration proceedings -- as the incumbents effectively concede in failing to cite a single contrary authority. As AT&T explained in Docket No. 96-98, an agency "'never los[es] jurisdiction to pass on petitions for rehearing'" after an appeal is filed, and where a court's "'stay order [does] not forbid [the agency] from acting on those pending petitions, it [is] not necessary for the Commission to seek permission of the court'" to rule on rehearing petitions. AT&T 96-98 Clarif. Reply pp. 3-4 (quoting American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 542 (1970)).

leave the states with ample discretion to address them. The basic statutory and economic principles, however, plainly do not vary by geographic location, as the Commission has already recognized in the Local Competition Order.[11] An incumbent proposal to saddle entrants with all competition onset costs is as discriminatory and as effective at prohibiting competition in California as it is in New York – as the CPUC has apparently recognized. CPUC p. 4 ("society as a whole [will] benefit from the implementation of local exchange competition" and thus any one-time cost surcharge must "be assessed in a nondiscriminatory manner"). Commission rules designed only to fence out such patently anticompetitive outcomes conflict with no legitimate state purpose.

To avoid any confusion, however, the Commission should reaffirm that it has established only minimum requirements for recovery of one-time costs and that states are free to determine the validity of incumbent claims and to impose further limitations as necessary to prevent discrimination and maintain competitive neutrality. See CPUC p.7 ("States are in the best position to make a determination of the validity of cost recovery"). This is precisely the type of cooperative regulatory framework contemplated by the Act. It preserves the States' vital role of "thoroughly reviewing" requests for recovery of implementation costs, (CPUC p. 7), and continuing to assure "procompetitive policies and rules that [will] open[] the local telephony market to competition" (id. p. 2). At the same time, it saves all parties from costly relitigation of general principles of cost recovery that

[11] See, e.g., Local Competition Order, ¶ 55 ("competitive circumstances," such as the "strong incentive [of LECs] to resist [their] obligations" under the Act, can be "more directly address[ed]" by national rules); see also id. ¶ 618 (national pricing rules that establish a "common, pro-competition understanding of the 1996 Act's pricing standards" ensure "the development of fair and efficient competition" in local markets) (emphasis added).

are mandated by the Act. See, e.g., GST Telecom p.11 ("needless, repetitive litigation greatly raises new entrants' costs and creates a barrier to entry"); Cox p. 5 ("Guidance after the fact is far less helpful than creating predictable rules of the road at the outset"). In these circumstances, the exercise of sound judgment counsels immediate action by the Commission, not the inaction proposed by GTE and others.

Commission Policy. Incumbents also argue that competitively neutral non-recurring charge rules are foreclosed by existing Commission policy embodied in both the Local Competition Order and earlier Commission precedents. This argument is not supported by the decisions they cite and is wholly undermined by those they ignore. The Commission has long recognized that one-time costs that foster competition and therefore benefit all consumers must be recovered from all carriers in a nondiscriminatory, competitively neutral fashion.

Indeed, as Sprint and others point out, competitively neutral spreading of one-time competition onset costs has been the rule at least since divestiture. For example, the costs of upgrading the incumbent Bell System networks from a one interexchange carrier system to an equal access system with multiple interexchange providers were borne by all interexchange carriers that used the network, including AT&T, even though AT&T did not in any sense cause those costs to be incurred (because AT&T already had access arrangements). See Sprint p. 7; ACSI p. 6 & n.13. See also United States v. Western Elec. Co., 569 F. Supp. 1057, 1066-68 & nn.30, 36 (1983) (the $2 billion in equal access implementation costs, including such network upgrades as increasing tandem capacity, benefit all long distance consumers and "are properly to be recovered from the

interexchange carriers, . . . because the expenditures represent improvements to the long distance network").

Each of the Commission decisions cited by GTE, by contrast, involved transactional non-recurring costs incurred as a result of individual carrier-specific requests for services or access to facilities. See, e.g., Investigation of Interstate Access Tariff Non-Recurring Charges, 2 FCC Rcd 3498, 3501 (1987) (addressing recovery of "expenses incurred, upon the request of a customer, in installing . . . an access service"). Such charges are analogous to the transactional "service order" costs an incumbent may incur in processing a change in a customer's local service provider. There is no dispute that properly determined transactional costs of this type generally should be recovered from the requesting carrier. See, e.g., AT&T 96-98 Clarif. Reply pp. 11-12. That in no way suggests, however, that only entrants, and not incumbents, should bear incumbents' non-carrier-specific one-time costs to adapt to the new competitive era.[12]

Incumbents make the same error in their selective citations to the Local Competition Order. In each case, the portions of that order that they cite as support for discriminatory one-time cost recovery in fact address transactional non-recurring costs

[12] Contrary to the claims of U S WEST and others, one-time competition onset costs are in no sense "caused" by AT&T or any other potential entrant. Congress, by passing the Act and for the benefit of end users, ordered U S WEST and other incumbents to make their networks multiple-carrier capable, and thus, if anything, Congress is the "cost causer." In any event, as explained above, exempting incumbents from one-time costs would differentially advantage incumbents, exacerbate existing entry barriers, make entry less profitable -- hence less likely -- and would have the effect of perpetuating incumbents' monopoly and market power. Congress has already determined that the social benefits of undistorted competitive entry outweigh its social costs, including one-time competition onset costs. Thus, incumbent cost causation claims are flatly inconsistent with the congressional goal of undistorted entry and the principles of nondiscrimination and competitive neutrality through which that goal has been implemented.

that may be incurred in response to carrier-specific requests. See, e.g., SBC/Pacific pp. 5-6; GTE pp. 5-10; U S WEST p. 5 (variously citing, e.g., Local Competition Order ¶¶ 382-386) (stating that the "affirmative steps" made by an incumbent "to condition existing loop facilities" are triggered by transactions initiated by "requesting carrier[s]"); id. ¶ 314 (addressing requests for "superior" quality elements); id. ¶ 199 (addressing requests for feasible "but expensive" interconnections)). Further, the cited provisions of the Local Competition Order unambiguously reaffirm the nondiscrimination principle and recognize that the local competition mandated by the Act will develop only if all rates are nondiscriminatory and based on true economic costs. See, e.g., id. ¶ 386 (charges for cross-connect facilities "must meet the cost-based standard provided in Section 252(d)(1)" and must be "reasonable and nondiscriminatory under Section 251(c)(3)"). See also id. ¶ 218 ("the term 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself").[13] In this regard, one-time costs associated with the onset of competition are no different than any other one-time capital investments in local network facilities for which each carrier is assessed charges in proportion to its relative use of the network (and each therefore has an equal opportunity to compete and to attempt to recover those costs).

[13] GTE also argues that cost recovery from all carriers, including incumbents, is not appropriate under the "general cost recovery scheme in Section 252" because that Section of the Act, unlike Section 251(e) relating to number portability, does not explicitly state that costs "shall be borne by all telecommunications carriers." GTE p. 9 & n.21. GTE again ignores that Section 252 does contain the term "nondiscriminatory," and there can be no doubt that the Act's use of this broad, general term can require contribution from all carriers, including incumbents, where (like number portability) benefits are spread to all users of the network.

"Forced Servitude" And Related "Takings" Claims. Finally, the claim by U S WEST and GTE that nondiscriminatory treatment would constitute "forced servitude," (US WEST p. 8) is frivolous. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952), the only case cited by U S WEST, the Commerce Secretary, acting without Congressional authorization, took actual "possession of most of the steel mills, . . . call[ed] upon the presidents of the various seized companies to serve as operating managers for the United States, . . . [and] directed [them] to carry on their activities in accordance with regulations and directions of the Secretary." As the courts have repeatedly recognized since, those actions were "qualitatively more intrusive," Yee v. City of Escondido, 503 U.S. 519, 538 (1992), than, as here, mere public utility regulation. No one has "seized" U S WEST's network and no one is asking U S WEST to "work for free," (U S WEST p. 9), but only to shoulder its share of the industry burden associated with fostering competition through a nondiscriminatory mechanism that will allow each carrier the same opportunity to recover those costs from its customers.

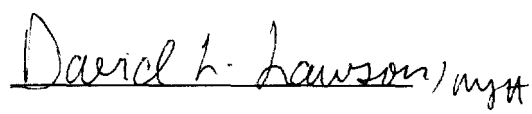
GTE's familiar confiscatory rate takings claim (pp. 13-14) fares no better, because, as the Commission has held, the Constitution "requires only that the end result of our overall regulatory framework provide LECs a reasonable opportunity to recover a return on their investment." Local Competition Order, ¶ 737. Here, application of the rules proposed by AT&T will spread efficiently-incurred competition-onset costs evenly among all carriers, including incumbents, based on use, thereby allowing each carrier a reasonable opportunity for a fair return on investment. Under such a system, incumbents' prices will not be "subsidy-laden," (GTE p. 14), but based entirely on their own capabilities to deliver services. Because all carriers will be competing on equal footing, any "jeopard[y to] the

financial integrity of the [local exchange] companies," Duquesne Light Co. v. Barasch, 488 U.S. 299, 312 (1989), will result not from the Act or the Commission's orders implementing the Act, but from incumbents' inability to operate efficiently and offer consumers the quality services they will demand in a competitive market.

CONCLUSION

For the foregoing reasons and those stated in AT&T's opening comments and its comments in the Docket No. 96-98 reconsideration proceedings, the Commission should continue its efforts to assure that prices for critical inputs are nondiscriminatory and appropriately cost-based by immediately granting AT&T's pending Petition for Clarification in CC Docket No. 96-98 relating to non-recurring charges.

Respectfully submitted,



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April 28, 1997

CERTIFICATE OF SERVICE

I, Thomas A. Blaser, do hereby certify that on this 28th Day of April, 1997, I caused a copy of the foregoing Reply Comments of AT&T Corp. to be served upon the parties listed on the attached service list via first class mail, postage prepaid.

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